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IN THE

Supreme Court of the United States

October Term, 1968

No. 612

THEATRICAL PROTECTIVE UNION NO. 1, INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, A.F.L.-C.I.O.,

Petitioner,

v.

HAROLD PHALEN, STEPHEN AMADOR and HARRY RYAN.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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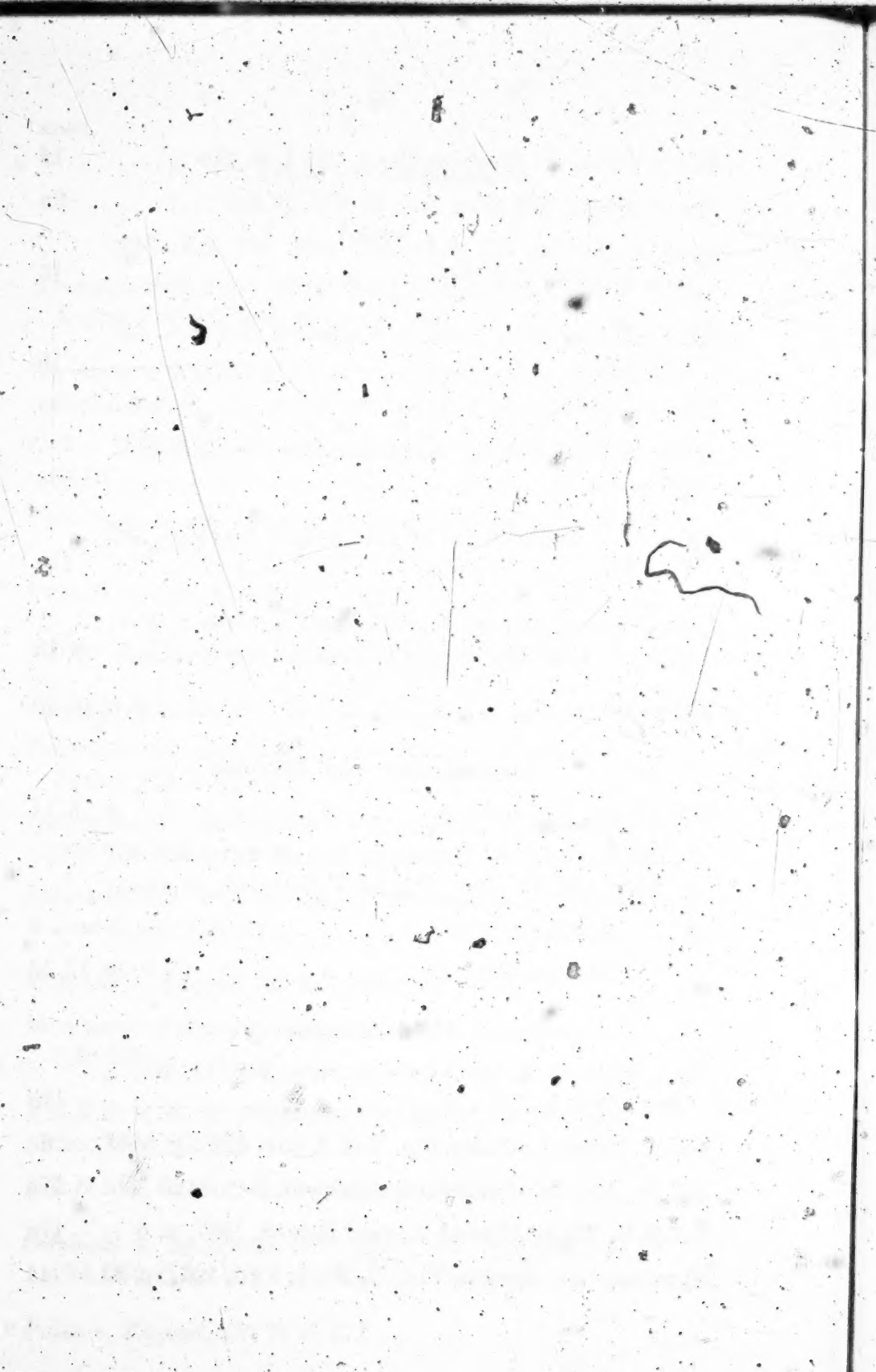

IN THE

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No.

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Petitioner,

v.

HAROLD PHALEN, STEPHEN AMADOR and HARRY RYAN.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case on May 15, 1968.

Opinions Below

The opinion of the Supreme Court of the State of New York, Bronx County, Special Term (App. A, *infra*, pp. 19-25), is reported at 51 Misc. 2d 334, 273 N.Y.S. 2d 248.

The opinion of the Appellate Division of the Supreme Court, First Judicial Department (App. B, *infra*, pp. 26-27), is reported at 27 App. Div. 2d 909, 278 N.Y.S. 2d 667.

The opinion of the Court of Appeals (App. C, *infra*, pp. 31-46), is reported at 22 N.Y. 2d 34.

Jurisdiction

The judgment of the Court of Appeals was entered on May 15, 1968 (App. C, p. 28). By order dated July 30, 1968, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including October 11, 1968. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. Section 1257).[1]

Question Presented

In the face of a claim of federal pre-emption, does a state court have jurisdiction to enjoin a labor union and award damages against it when the crux of the charges is that the union, by reason of the non-membership of certain individuals seeking employment in the union's jurisdiction and for whom the union is alleged to be collective bargaining agent when so employed, caused them to be removed from jobs and replaced by members, made it difficult for them to obtain other employment within its jurisdiction, interfered with their employment opportunities, and required them to pay assessments on earnings as a condition of employment.

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[1] The New York Court of Appeals' order, reversing the Appellate Division's order of dismissal, and asserting state court jurisdiction to grant injunctive relief and award damages in the face of a claim of federal pre-emption, and remanding this cause to the State Supreme Court for that purpose, constitutes a final judgment of that court which is reviewable by this Court on certiorari. *Local No. 438 Construction & General Laborers Union* v. *Curry*, 371 U.S. 542; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541; *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555.

Statutes and Constitutional Provisions Involved

Article 6, Clause 2, of the Constitution of the United States, provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of the State to the Contrary notwithstanding."

Section 8(a)(3) of the Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. Section 158(a)(3) (1958), states in pertinent part as follows:

> "It shall be an unfair labor practice for an employer—
>
> * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *".

Section 8(b) of the Act, 61 Stat. 140 (1947), 29 U.S.C. Section 158(b) (1958), states in pertinent part as follows:

> "It shall be an unfair labor practice for a labor organization or its agents— * * *
>
> "(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . ."

Section 10(a) of the Act, 49 Stat. 453 (1935), as amended, 29 U.S.C. Section 160(a) (1958), states as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise; *Provided,* that the board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Statement of the Case

In May, 1966, relying upon and setting forth an alleged prolonged course of particularized discriminatory employment practices by petitioner (hereinafter called the "Union"), directed at them by reason of their non-membership in the Union, (membership having been denied to them) three individuals (hereinafter called "Complainants") filed a petition in a mandamus-type proceeding in the Supreme Court of the State of New York, Bronx County, praying for an order directing the Union to grant them membership therein (R. 7-11).

The Union moved at Special Term to dismiss the petition on the ground, *inter alia,* that (R. 21):

"(1) There is no authority for this proceeding;

(2) This court does not have jurisdiction to entertain this proceeding or to grant the relief sought therein".

The Court denied the motion to dismiss. (App. A, *infra* p. 25). The Union appealed to the Appellate Division, which reversed and dismissed the Petition (App. B, *infra*, p. 26). The Complainants then appealed to the Court of Appeals, which reversed the Appellate Division and remanded for further proceedings in the State Supreme Court. (App. C, *infra*, p. 38).

A. The Petition in the State Court

The petition is permeated with allegations constituting routine charges of unfair labor practices. Typical examples are as follows: Complainant Ryan alleges summary removal from his job "at the request of respondent union * * * in favor of a member of said respondent", (R. 9), and that "the sole reason for loss of employment "* * * was due to his being a non-member" of the Union (R. 10). Complainant Phalen claims he "was removed from his said part time job and replaced by " * * * a member of respondent" and that he "has been denied the equal opportunity to said part time work simply because he is a non-member" (R. 8). Complainant Amador asserts that by reason of non-membership he "has been denied opportunity to compete on an equal basis for employment with members" (R. 11); that he was "unable to obtain sufficient employment "* * * from respondent Union * * * solely because he was a non-member of respondent". (R. 10), and that by reason of the Union's discriminatory practices "he stands to lose his previously earned pension credits * * *" (R. 10).

In addition to their charges of interference with employment by reason of non-membership, the complainants claim that the Union monopolizes the jobs in its jurisdiction (R. 13) and that "a non-member must pay 4% of his gross salary to respondent Union which is used to provide burial

and other benefits for members of respondent Union" (R. 11).[2]

Referring to the petition and the complainants, the Court of Appeals says (App. C, *infra*, pp. 31, 32):

> "They are not members of the Union, and as a result of such non-membership, according to their petition, they have had difficulty in obtaining employment and have at the instance of respondents been summarily dismissed from jobs they have succeeded in obtaining and have been replaced in these jobs by union members. * * * Petitioners also complain that they were required by the union to pay 4% of their earnings to the union. These payments, they assert, went into a union fund which benefited only members of the union".

B. The Rulings in the New York Courts

1. At Special Term of the Supreme Court, the Union in its brief in support of the motion to dismiss, argued, *inter alia*, that "National Labor Relations Board Has Exclusive Jurisdiction over the Matters Set Forth in the Petition". The Complainants, in their brief, argued *inter alia*, that "the Doctrine of Pre-emption is Not Applicable". Special Term denied the Union's motion to dismiss the petition and in its opinion granting same made no reference to the pleas to the jurisdiction (App. A, *infra*, pp. 19-25).

2. The Union appealed to the Appellate Division of the Supreme Court, First Department. The issue of pre-emption was briefed by both parties, and argued. By a divided court (App. B, *infra*, p. 27), the determination appealed from was reversed and the petition dismissed upon the ground, *inter alia*, that "* * * the grievances of these petitioners are arguably within the ambit of the National

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[2] These allegations amount to charges of unfair labor practices. *NLRB* v. *H. K. Ferguson Co.*, 337 F. 2d 205, cert. den. 380 U.S. 912; *NLRB* v. *Operating Engineers*, 385 F. 2d 874 (1967). See CCH Labor Law Reports, Vol. 3, par. 4520, p. 9517.

Labor Relations Act, as indicated by their own previous recourse to this statute, although subsequently withdrawn". (R. 43).

3. On the complainants' appeal to the Court of Appeals, that court formulated the issues before it as follows (App. C, *infra*, p. 31):

> "On this appeal we are called upon to consider two problems, first, our jurisdiction, in the face of a claim of federal pre-emption, to afford relief to working people who have been unfairly and discriminatorily treated by a labor union which is their exclusive bargaining agent with their employer, and, second, what remedies, assuming we have jurisdiction to afford any relief at all, are available to such aggrieved employees".

In rejecting the plea of federal pre-emption, the Court of Appeals relied upon *Vaca* v. *Sipes*, 386 U.S. 171, and in so doing, stated that "in line with *Vaca* v. *Sipes*, the reasoning of which we believe is applicable here, we are of the opinion that our courts have jurisdiction to entertain this action" (App. C, *infra*, p. 34). In a concurring opinion, Chief Justice Fuld stated that (App. C, *infra*, p. 44):

> "* * * I hesitate to place sole reliance * * * on *Vaca* v. *Sipes* (386 U.S. 171, *supra*), in view of the very restrictive meaning which had been given that decision by knowledgeable commentators. (See e.g., Lewis, Fair Representation in Grievance Administration: *Vaca* v. *Sipes*, 1967 The Supreme Court Review 81, 99.)".

Referring to the conduct complained of, the Court said (App. C, *infra*, p. 36):

> "The gravamen of the instant petition and of the affidavits submitted in support of it is not that petitioners are per se injured through nonmembership in respondent or that they would not be perfectly satisfied to work under the collective bargaining agreements negotiated with the various theaters by respondent, if only they could be assured of equal

opportunity for work, but that they have suffered economic injury through the illegal acts of the union in persuading employers to discriminate against them and in exacting tribute from them".

The Court of Appeals rejected the prayer of complainants for an order compelling the union to grant membership to them (App. C, *infra*, p. 36). The Court noted that the grievance complained of "might well be remedied through an action in equity in which the court could enjoin the continuance of such conduct and award incidental damages for past injuries" (App. C, *infra*, p. 36). The proceeding was accordingly remanded "to Special Term, Bronx County, with directions that an order be entered allowing petitioners to prosecute this action as if it has been commenced as a plenary action seeking whatever relief might be appropriate, including injunctive relief" (App. C, *infra*, p. 38).

Chief Justice Fuld was of the minority views that, if the facts were as alleged, complainants would be entitled to an order granting them membership under the rationale of *Gonzales* (*International Ass'n of Machinists* v. *Gonzales*, 356 U.S. 617) on the theory that since the NLRB "lacks the power to regulate admission of workers to membership, an order issued by a state court requiring a union to grant membership to a worker would not conflict with any Board remedy" (App. C, *infra*, p. 45).[3] The learned Chief Justice also equated a suit to compel admission to membership of one "wrongfully" excluded to a suit for restoration to

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[3] It is the converse of this premise which is true (*Garner* v. *Teamsters*, 346 U.S. 485, 490), and, as held by this Court in *Garmon* (359 U.S. at 247) "* * * since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld by the National Labor Relations Board only accentuates the danger of conflict". Moreover, as noted by this Court in *Int. Ass'n of Machinists* v. *Labor Board*, 311 U.S. 72, 82, "It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged".

membership of one wrongfully ousted (App. C, *infra*, p. 45).[4]

The majority of the Court of Appeals having ruled, however, that "the drastic remedy of compelling respondent to admit petitioners to membership, a measure at variance with the announced legislative policy of this State * * * seems uncalled for" (App. C, *infra*, p. 36), and having remanded the case to allow the petitioners to seek injunctive and other relief, it follows that the remedy of mandatory membership is not available and that Judge Fuld's reliance on *Gonzales* is, therefore, academic.

Reasons for Granting the Writ

1. The ruling by the New York Court of Appeals presents compelling reason for this Court to review and limit the scope and reach of *Vaca*. The assertion of state court jurisdiction over the type of union conduct complained of in this case, on the authority of *Vaca*, is an open invitation to sister states to take judicial cognizance of complaints of discriminatory employment practices by unions expressly within the prohibition of Section 8(b)(2) and which are totally unrelated to breach or administration of collective bargaining contracts or to Section 301 grievances. The decision by the New York Court of Appeals in this case presents an irreconcilable conflict with *Local 100, United Assn. of Journeymen* v. *Borden*, 373 U.S. 690, and *Local 207 Int. Assn. of Bridge Workers* v. *Perko*, 373

[4] A wrongful ouster from membership is in the nature of a breach of contract (*Polin* v. *Kaplan*, 257 N.Y. 277, 281-2) or may be statutory violation (29 U.S.C. §§ 401, *et seq.*). On the other hand, the traditional right of unincorporated associations, including labor unions, arbitrarily to exclude from membership, except under civil rights laws, is well established. *Oliphant* v. *Locomotive Firemen, etc.*, 156 Fed. Supp. 89 aff'd 262 F 2d 359, cert. den. 355 U.S. 893, 78 S. Ct. 266; *McKane* v. *Adams*, 123 N.Y. 609; *Simon* v. *Berry*, 210 App. Div. 90; *Ross* v. *Ebert*, 275 Wis. 523, 82 NW 2d 315.

U.S. 701, and if permitted to stand, will be disruptive of applicable statutory procedures and render illusory the doctrine of federal pre-emption as established by this Court in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236.

Invoking and relying on *Vaca* v. *Sipes, supra,* the court below rejected a plea of federal pre-emption and asserted jurisdiction over the type of union conduct whose lawfulness "could initially be judged only by the federal agency vested with exclusive jurisdiction to apply federal standards". (*Plumbers Union* v. *Borden,* 373 U.S. at 698.)

The Court of Appeals overlooked the fundamental difference between the union conduct in *Vaca* and the union conduct in this case. We submit that the union conduct complained of here, totally unrelated to the negotiation, administration, violation or enforcement of a collective bargaining contract, is not within the concept, reach or definition of "unfair representation" under *Steele*[5] *or Vaca.* In effect, the Court below equates union conduct constituting classical unfair labor practices within the prohibition and definition of Section 8(b)(2). (discriminatory interference with employment by reason of non-membership), with union conduct constituting unfair representation within the meaning of *Vaca* (wrongful refusal to process a grievance). Stated otherwise, according to the Court of Appeals, every 8(b)(2) violation is, under *Vaca,* an unfair representation, thus conferring upon state Courts jurisdiction in an area

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[5] *Steel* v. *Louisville and N.R. Co.,* 323 U.S. 192. In that case (1944) this Court accorded judicial cognizance to a complaint of unfair representation because no other forum for redress was available. "In the absence of any available administrative remedy, the right here asserted * * * is of judicial cognizance". (323 U.S. at 207.) In the instant case the complainants have available an administrative agency—the N.L.R.B.—especially created by Congress for the express purpose of providing an effective forum for the redress of precisely the type of complaint here asserted.

where heretofore exclusive jurisdiction has resided in and has been exercised by the NLRB.

The basic differences between the union's conduct in *Vaca* and the Union's alleged conduct in this case preclude the application of *Vaca* or any other case as authority for state court jurisdiction herein. In *Vaca,* plaintiff sued the union for damages, claiming that he had been wrongfully discharged by his employer in violation of the terms of an existing collective bargaining agreement and that the union wrongfully had failed to arbitrate his grievance as provided in the agreement. In the language of Mr. Justice White, 386 U.S. at page 195:

> "In this case, the employee's complaint was that the union wrongfully failed to afford him the arbitration remedy against his employer established by the collective bargaining agreement".[6]

Based upon such conduct, this Court reasoned that the union had breached its duty of fair representation as evolved in *Steele,* and related cases;[7] that the breach of such duty is interrelated with breach of contract under Section 301,[8] that, historically, the NLRB had not claimed

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[6] In a footnote, Mr. Justice White pointed out that "we are not dealing here with situations where a union has affirmatively caused the employer to commit an alleged breach of contract". (386 U.S. at p. 197.)

[7] *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen,* 323 U.S. 210; *Humphrey* v. *Moore,* 375 U.S. 335.

[8] Commenting on *Vaca,* the *Syracuse Law Review,* Vol. 19, No. 1, Fall, 1967, p. 83 observes:

> "Without expressly denominating the suit as a section 301 action, the majority nevertheless seems to have upheld the court's jurisdiction on a basis parallel to section 301". Similarly, in *Case Western Reserve Law Review,* Vol. 19, No. 1, November 1967, p. 153, the writer states:
>
> "It appears that the Court relied on an extension of the state court's jurisdiction under Section 301 to deny administrative pre-emption in the instant case".

jurisdiction over unfair representation cases, that the application of the pre-emption doctrine was doubtful in cases where the Board's exclusive jurisdiction could not be fairly inferred; and that the courts had consistently taken cognizance of unfair representation cases subsequent to the passage of the Act, whereas the NLRB did not interpret a breach of duty of fair representation as an unfair labor practice until 1962 in *Miranda Fuel* (140 N.L.R.B. 7, enf. den. 326 F 2d 132), fifteen years after Section 8(b)(2) was enacted. It was largely upon the basis of these factors, none of which is here applicable, that this Court concluded[9] that the union's breach of duty of fair representation was within state court jurisdiction.

The conduct attacked in this case is so remote from the grievance alleged by the plaintiff in *Vaca* as to destroy any analogy between the two cases. In this case, the complaint against the Union presents no charge of violation of, or failure to enforce any collective bargaining agreement by the Union or employer nor are any terms of any agreement referred to. Rather the petition is limited to the alleged actions of the union in causing the complainants to be removed from jobs and in curtailing their efforts to procure other employment, by reason of non-membership; in denying to them opportunities of employment equal to those enjoyed by union members, and in requiring them to pay assessments on their earnings as a condition of employment without concomitant membership benefits.

The union conduct over which the state court has asserted jurisdiction is directly within the prohibition of and constitutes unfair labor practices by definition under Section 8(b)(2) of the Act. (29 U.S.C., Sections 158(b)(2)):

> "Section 8(b). It shall be an unfair labor practice for a labor organization or its agents—

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[9] Chief Justice Warren and Justice Harlan joined in a dissenting opinion by Justice Fortas, 386 U.S. at 198.

(2) * * * to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *.

"Section 8(a). It shall be an unfair labor practice for employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

Congress has mandated, and this Court has reiterated, that jurisdiction to consider and act upon charges of unfair labor practices under Section 8(b)(2) resides exclusively in the National Labor Relations Board. Section 10(a), 29 U.S.C. Section 160(a), provides as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practices (listed in Sec. 158 of this Title) affecting commerce. This power shall not be affected by and other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."

The controlling principle governing the question of jurisdiction was formulated by this Court in *Garmon* (359 U.S. 236, 204-5):

"When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between the power asserted by Congress and requirements imposed by state law. . . .

"At times it has not been clear whether the particular activity regulated by the States was governed by Sec. 7 or Sec. 8 or was, perhaps, outside

> both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. . . .
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> ". . . When an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the State as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

This rule flows from and rests upon the "Supremacy Clause" of Article 6 of the Constitution which makes federal law the "Supreme Law of the Land" and enjoins that "the Judges in every State shall be bound thereby". Comprehensive statutes enacted by Congress regulating labor relations vest the National Labor Relations Board with exclusive primary jurisdiction for the interpretation and enforcement thereof.

As stated by Mr. Justice Harlan in his dissenting opinion in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, 88 S.Ct. 1618 (1968), "The reason why it was deemed necessary to fashion the doctrine of preemption under the federal laws was that it would be intolerably disruptive if this statutory scheme were interpreted differently by state and federal courts". The state courts, therefore, are precluded from enforcement of state laws on matters subject to federal statutory regulations. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230.

The union conduct with which we are here concerned is neither "Delphic" [10] in nature nor ". . . merely of pe-

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[10] *Int. Assn. Machinists* v. *Gonzales*, 356 U.S. at 619.

ripheral concern of the NLRA" (*Garmon, supra*). On the contrary, the totality of the conduct over which the court below has asserted jurisdiction is "* * * plainly within the central aim of federal regulation". (*Garmon, supra*), and, as stated by this Court in *Borden*, is conduct "whose lawfulness could initially be judged only by the federal agency vested with exclusive jurisdiction to apply federal standards". Similarly, in *Iron Workers* v. *Perko, supra*, the conduct complained of was interference with plaintiff's employment. Finding that "the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations", this Court ruled that (373 U.S. at 708) "* * * it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction".

2. One of the principal reasons advanced by this Court in withholding the application of the pre-emption doctrine in *Vaca* was that "it has never been rigidly applied to cases where it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the NLRB" (386 U.S. at 179). The converse is equally true i.e., that pre-emption will be rigidly applied in cases where it can be fairly inferred that Congress did intend exclusive jurisdiction to reside in the NLRB. The instant case involves conduct which not only is within the express prohibition of Section 8(b)(2), but which is of the kind over which the NLRB always has exercised exclusive jurisdiction. This postulate is exemplified in *Barunica* v. *United Hatters, Cap and Millinery Workers, Local 55*, 321 F. 2d 764 (C.A.-8; 1963), wherein plaintiff alleged that the union "has refused to refer plaintiff out on employment * * * has restrained and discriminated against her in seeking employment * * *; that employment in her trade has been available but the union by its actions has deprived her of earning a

living".[11] In dismissing the complaint, the Court said (321 F. 2d at 766):

> "• • • the complaint here alleges no more than that the defendant union has refused to send the plaintiff out on any employment and has discriminated against her in seeking employment and has thus deprived her of earning a living. This amounts, however, only to a routine allegation of an unfair labor practice and a violation of Section 8(b)(2). It presents a controversy clearly within the jurisdiction of the Labor Board. And it is the kind of controversy with respect to which it has been historically held that the Board has exclusive jurisdiction to afford primary relief".

3. Another significant factor underlying this Court's rejection of pre-emption in *Vaca* was that the doctrine of unfair representation " • • • remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the L.M.R.A." (386 U.S. at 181). In other words, this Court declined to sanction NLRB exclusive jurisdiction in respect to a matter over which the courts had exercised undisputed jurisdiction for years after adoption of the L.M.R.A. of 1947. It cannot be argued in the instant case that, subsequent to 1947, the courts, without challenge, asserted jurisdiction over activities specifically proscribed by the Act, namely, discriminatory employment practices by a labor union because of nonmembership. Attempts by the courts to exercise jurisdiction in such cases routinely are contested and the exclusive jurisdiction of the NLRB in such situations consistently upheld. (*Borden* and *Perko, supra.*) The New York Court of Appeals has heretofore expressly recognized and applied federal pre-emption to cases of this kind. (*Costaro* v. *Simons*, 302 N.Y. 318 (1951); *Ryan* v. *Simons*, 277 A.D. 100, aff'd. 302 N.Y. 742 (1951), cert. den., 342 U.S. 897.

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[11] The charges in the instant proceeding include and go beyond those in the cited case, *i.e.*, discriminatory *removal* from jobs and unlawful exactions of assessments.

4. The far-reaching import of the ruling by the New York Court of Appeals with respect to union conduct within the express prohibition of Section 8(b)(2) cannot be overstated. To permit state courts to exercise jurisdiction over complaints of this nature will not only disrupt, but will render innocuous the established federal regulatory system. Section 8(b)(2) charges constitute a substantial part of the Board's caseload[12] and the inevitable effect of sanctioning the ruling under consideration will be to inundate the courts with such cases, and diverse procedures and remedies necessarily will supplant those fashioned for and by the Board. Congressional intent for central administration and uniform standards will be thwarted and the precept of *Garmon* consigned to oblivion.

This is precisely the situation decried by this Court in *Garner* v. *Teamsters*, 346, U.S. 490, 491:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specified and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final adminstrative order. Congress evidently considered that centralized administration of specially designed procedures were necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies * * *. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal

[12] Thirty-second Annual Report, N.L.R.B. 1967; C.C.H. Current Comment and Analysis, Sec. 8122.

Board, precludes state courts from doing so * * *. And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action".

CONCLUSION

For the reasons stated, petitioner prays that this petition for certiorari be granted.

Respectfully submitted,

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